SUPREME COURT, U.S.
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NO. 828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.

On Appeal from the United States District Court for the Southern District of Texas.

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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The Atchison, Topeka and Santa Fe Railway Company, et al., appellants in No. 828, submit this brief in opposition to the motion of the United States and Interstate Commerce Commission and the motion of Nueces County Navigation District No. 1 and Gulf Compress, which seek to have this Court affirm summarily the judgment of the district court below.

Statement

The argumentative technique employed by the appellees is to ignore the issues presented in this case by constructing a rationalization for the Commission's order independent of the conflicting rationalizations offered by the Commission in its report. In essence, they contend that the differences in distance between the origin territory and the ports do not warrant or compel a difference in rates, therefore—they argue—the Commission reached the correct *result*. In this manner, the appellees seek to avoid scrutiny of several basic questions involved here concerning Section 3(1) of the Interstate Commerce Act [49 U.S.C. §3(1)] and the responsibility of administrative agencies and reviewing courts to adhere to the standards set forth in the Administrative Procedure Act [5 U.S.C. §§1001, *et seq.*] The silence of the appellees does not negate the existence of these substantial questions but, rather, constitutes an implicit concession that analysis of them requires reversal of the judgment of the district court. Moreover, the arguments that the appellees do make fail to account for the fact that the differences in distance are substantial according to the Commission's own analysis of the evidence and fail to account for the fact that the Commission's rationalization of its order was based upon the proposition that it has authority to compel the railroads to establish equal rates despite substantial differences in distance (J.S. App. 23).[1]

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[1] "J.S." and "J.S. App." refer to pages of the Jurisdictional Statement filed by appellants in No. 828.

Argument

1. The *sine qua non* of the Commission's order is its assertion that it has authority to compel the railroads to establish equal rates to competing ports despite substantial differences in distance, which is coupled with its finding that, based upon Docket 28300 distances, Corpus Christi is from 120 to 160 miles, or from twenty to sixty percent, more distant from the origin territory than the allegedly favored ports (J.S. App. 23).[2] Whether the Commission has such unbridled discretion to compel the railroads to establish equal rates despite substantial distance differences is a question of considerable importance. This Court has considered it on prior occasions and has held that the Commission has no authority to adjust freight rates for the purpose of neutralizing natural geographic disadvantages such as those Corpus Christi has with respect to the origin territory here involved. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911); *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 524 (1924); *Texas and Pacific R. Co.* v. *United States*, 289 U.S. 627,

[2] The characterization of these differences in distance as "substantial" is not a matter of advocacy. In a prior proceeding brought by Corpus Christi to secure equalization of export cotton rates from substantially the same origin territory, the Commission found that distance differences ranging from 130 to 163 miles—almost identical with those involved here—were "of such a substantial character as to preclude" an order requiring equalization. *Nueces County Nav. Dist. No. 1* v. *Abilene & S. Ry.*, 155 I.C.C. 712, 716 (1929).

629 (1933); *State of New York* v. *United States*, 331 U.S. 284, 331-332 (1947).

2. The appellees seek to preclude analysis of the question of whether the Commission has discretion to compel the railroads to disregard substantial distance differences by relying upon the Commission's inexplicable statement that the distances here are only "slightly more" to Corpus Christi (J.S. App. 23) and, somewhat inconsistently, by relying upon the contention that if the railroads could voluntarily establish equal rates to Corpus Christi despite its geographical disadvantage, the Commission may compel them to do so under Section 3(1). This reliance is misplaced.

a) First, the appellees are unable to agree on what in the Commission's report supports its statement that distances to Corpus Christi are only "slightly more".[3] The Corpus Christi interests cite geographic, highway and so-called "weighted average" distances but concede, at page 4 of their motion, that the Commission was "evidently"

[3]The anomalous character of this statement is best illustrated by comparing it with the finding in *Nueces County Navigation Dist. No. 1* v. *Abilene & S. Ry.*, 155 I.C.C. 712, 716, that almost identical differences in distance are of "such a substantial character as to preclude" equalization. The Commission, of course, did not discuss this prior case in its report, although it involved the same commodity, the same ports and substantially the same origin points. The district court, responding to the contentions of the appellees, provided its own rationalization for the Commission's failure to explain the basis of its departure from its prior ruling. This, in itself, requires summary reversal of the district court's judgment. *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 442-3 (1965); *Burlington Truck Line* v. *United States*, 371 U.S. 156, 168-169 (1962).

referring to rail distances. They do not state what specific rail distances the think the Commission was referring to, but they subsequently suggest that Corpus Christi is 10.1 percent more distant based upon "actual railroad mileages via circuitous routes" (p. 5). This distance comparison, however, does not appear in the Commission's report. The Government, on the other hand, suggests that the Commission might have been referring to average Docket 28300 distances. This, according to footnote 5 of the Government's motion, shows that Corpus Christi is, on the average, about twenty-five percent more distant. The Commission did not engage in this averaging process in its report; nor would it have been appropriate for the Commission to have done so, since the issue is the lawfulness of the rates from each individual point rather than from the origin territory as a whole.

b) Second, the Government's contention that there is no distinction between what the railroads may do voluntarily and what the Commission may compel them to do has no merit. *United States* v. *Illinois Central R.R.*, 263 U.S. 524 (1924), cited by the Government, refutes rather than supports its position. See also *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541, 553 (1912) and *Boston & Maine R.R.* v. *United States*, 202 F. Supp. 830, 837 (1962), aff'md 373 U.S. 372 (1962). The reason the Government makes this erroneous contention is to seek refuge in this Court's statement in *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 588 (1949), that the Commission has "broad discretion . . . to accommodate the

factors of transportation conditions, distance and competition." The *Ayrshire* case, also relied upon by the district court (J.S. App. 9-10), involved, *inter alia*, the question of the degree to which the railroads could voluntarily equalize more distant points without violating Section 3(1) of the Interstate Commerce Act. Consequently, that case has no application here since the scope of the Commission's discretion to subordinate distance to other factors, whatever it may be when the lawfulness of equalization voluntarily proposed by the railroads is in issue, has no bearing upon the lawfulness of existing rates which properly give effect to differences in distance. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911); *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 524 (1924); *Texas and Pacific R. Co.* v. *United States*, 289 U.S. 627, 629 (1933); *State of New York* v. *United States*, 331 U.S. 284, 331-332 (1947); *Alabama G. S. R. Co.* v. *United States*, 340 U.S. 216 (1951); *Baltimore & Ohio R. Co.* v. *United States*, 151 F. Supp. 258, 275 (1957), vacated on other grounds, *I. C. C.* v. *Baltimore & O. S. Co.*, 355 U.S. 175 (1957).

3. Irrespective of the appellees' diverse, *post hoc* attempts to rationalize the Commission's statement that distances are "slightly more" to Corpus Christi, the fact remains that that statement is factually inconsistent with the Commission's analysis of comparative Docket 28300 distances and logically inconsistent with its rationalization that it has authority to compel the railroads to disregard the substantial differences revealed by that analysis (J.S. App. 23). This fundamental inconsistency raises a number of important questions that the appellees have not discussed. For example, does the finding that the distances

to Corpus Christi are "slightly more" so conflict with the Commission's analysis of Docket 28300 distances and with its legal rationalization as to be arbitrary and without evidentiary support? Does this inconsistency render the Commission's report too ambiguous for adequate judicial review?[4] These are significant questions, and the failure of the appellees to designate any consistent support for the Commission's statement that distances to Corpus Christi are slight as well as the appellees' inability to suggest any coherent resolution of the basic inconsistencies in the Commission's report demonstrate, we submit, that these questions must be answered in the affirmative.

4. By employing an argumentative technique that, in essence, is a *post hoc* effort to show, independent of the reasoning of the Commission, that a proper result was reached, the following additional issues, discussed in our Jurisdictional Statement, were ignored:

a) The Commission's reliance upon prior, distinguishable proceedings without explanation of the basis therefor (J.S. 13-15);

b) The Commission's failure to explain its direct departure from a prior ruling that the differences in distance from origins involved here preclude an order requiring equalization of export cotton rates to Corpus Christi (J.S. 15-17);

c) The district court's erroneous interpretation of Section 3(1) contained in its finding that equaliza-

[4] The district court acknowledged that the report "is so imprecise in revealing just what findings it is making that the order borders dangerously on running afoul of the requirement that agencies disclose the basis of their orders" (J.S. App. 3-4). The district court resolved the imprecision by failing to take note of the fundamental inconsistencies in the report.

tion of rates on other commodities is a "relevant transportation condition" (J.S. 17);

d) The district court's reliance on *post hoc* rationalizations not found in the Commission's report (J.S. 18); and

e) The district court's error in affirming the Commission's order despite the acknowledged lack of clarity in the Commission's report (J.S. 19).

These issues are substantial, having a direct bearing on the responsibility of administrative agencies and reviewing courts to adhere to the standards set forth in the Administrative Procedure Act. We submit, quite apart from our view that the Commission reached the wrong *result*, that those standards have not been adhered to here.

Conclusion

For the reasons stated, we ask this Court to deny the motions to affirm and to note probable jurisdiction.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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CITY OF GALVESTON ET AL. *v.* UNITED STATES ET AL.; and

THE ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL. *v.* UNITED STATES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

Nos. 827 and 828. Decided March 13, 1967.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.